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No. 94-890

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Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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The Railway Labor Executives' Association and its member unions that are respondents to the petition have waived their right to file an opposition to that petition and to the petition filed by the Burlington Northern Railroad Company in a companion case, No. 94-907. We do not understand that those respondents disagree with the *en banc* decision by the Court of Appeals invalidating the National Mediation Board's Railroad Merger Procedures, as they requested that result. But their failure to file an opposition does indicate that those unions and their Association do not oppose review of that decision by this Court so as to obtain a definitive decision of the issues.

On the other hand, the Solicitor General for the National Mediation Board (NMB) has filed a Brief in Opposition to both petitions which essentially disagrees with the

decision below in regard to both reviewability and to the merits of that decision, assuming reviewability; but opposes a grant of the petitions apparently because the issues are deemed not to be important enough to warrant review by this Court. We address that matter in this Reply.

1. "In adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between labor and management in this most important national industry." *Trainmen* v. *Chicago, R. & I. R. Co.,* 353 U.S. 30, 40 (1957). In order to further "the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations," Congress in § 2 Fourth of the Act "made explicit that the representative selected by a majority of any class or craft of employees should be the exclusive bargaining representative of all the employees of that craft or class," so that the "minority" were thus "deprived by statute of the right . . . to choose a representative of their own . . . ." *Machinists* v. *Street,* 367 U.S. 740, 759 (1961).

There can hardly be any doubt of the importance of those congressional policies or that the NMB itself regards its merger procedures as the most appropriate means of implementing those policies in the circumstances of a merger. Although a merger or consolidation of two or more carriers into a single system means that prior certifications of representatives on a component of that system are not based upon a choice by the majority of the system-wide craft or class, and could result in minority representation, the incumbent unions often were content with that status. Hence, as long as the NMB did not permit a carrier to invoke a representation investigation, its capacity to deal with the problem was "greatly limited . . . ." *Grand Trunk Western Railroad Co.,* 17 N.M.B. 282, 298 (1990). In short, as the NMB stated in its *Burlington Northern* decision now before this Court, one

"of the purposes of the Act is to ensure labor stability in the railroad industry"; "craft or class questions, as well as the question of who is the authorized or designated representative, may arise" from mergers; and resolution of those questions by the NMB "promotes labor stability." See Pet. App. H at 119a.

Indeed, the importance of resolution by the NMB of such issues is graphically portrayed by the Statement of the Case in the Opposition, at 4-5, including recognition that the "confusion that arises regarding the identity of the authorized representative, as well as the accretion of multiple representations, poses significant practical problems that can frustrate the negotiation of collective bargaining agreements and hinder day-to-day labor-management relationships." We submit that a decision striking down procedures adopted by a federal agency for the purpose of remedying such disruptions of stable labor-management relationship in the railroad and airline industries is sufficiently important to justify review by this Court, even if the legal bases for that decision were much less questionable than in the present case. This is particularly so because of the importance of uninterrupted rail transportation to the economy and the public interest as a whole; and thus of the efficient working of the machinery provided by the Railway Labor Act so as to promote its primary purpose of preventing railroad strikes.[1]

2. The Opposition asserts (at 11) that, although the NMB does not agree that its merger procedures "violate

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[1] The "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565 (1930). See also, *e.g.*, *Shore Line* v. *Transportation Union*, 396 U.S. 142, 148-149 (1969). Congress recognized as recently as June 26, 1992, in P.L. 102-306, that "it is essential to the national interest" to avoid railroad strikes that "threaten essential transportation services of the United States." 106 Stat. 260.

the Act—grossly or otherwise—that disagreement does not warrant this Court's review," as the Solicitor General has been informed that the NMB "is considering alternative ways to address the representation problems that arise from mergers and consolidations." There is no indication of what those "alternative ways" are or could be, but under the majority decision by the *en banc* Court of Appeals, they cannot authorize the NMB to address those representation problems in a representation investigation either at the request of a carrier or *sua sponte*. And, the NMB has concluded that its old procedure under which only employees or their union representatives may apply for a representation investigation has been a primary cause of those representation problems rather than their cure.

Moreover, any possibility of "alternative ways" did not prevent the NMB from vigorously defending its merger procedures in the lower courts, including petitioning for the *en banc* hearing after a panel of the Court of Appeals had invalidated those procedures. In that petition, the NMB asserted that the panel's decision not only was "of great legal significance," but also "unsettles numerous bargaining relationships established in the railroad industry since the advent of" those procedures in 1989, and almost certainly overturns the practice in the airline industry under similar procedures since 1987." Petition for Rehearing with Suggestion for Rehearing *En Banc* for the Appellee National Mediation Board, at 3.

In addition, even if "alternative ways" can be and are developed, they may well be subjected to judicial review under the Administrative Procedure Act (APA) if the *en banc* decision by the Court below is not reviewed and reversed by this Court. Although the Opposition regards that ruling to be wrong, it is said (at 12) to be "of limited applicability because the Board rarely acts through formal rulemaking processes." That is cold comfort when the Board does act through "formal rulemaking proc-

esses." Moreover, the NMB did not act in that manner with respect to its merger procedures, which are not regulations and have not been published in the Code of Federal Regulations.[2] It was sufficient for Judge Randolph, and thus for the majority of the *en banc* Court of Appeals, that those procedures constitute " 'agency statement[s] of general . . . applicability and future effect designed to . . . implement policy' (5 U.S.C. § 551(4))." Pet. App. A at 33a. And, he concluded for the Court that therefore those procedures could be reviewed under the APA, even if their application could not. Although we believe that ruling to be both unprecedented and clearly erroneous, see Pet. at 13-16, if left standing any "alternative ways" adopted by the NMB could be reviewed under the APA if they have general applicability and future effects designed to implement policy; which surely must be the case if those "alternative ways" are to have any utility in addressing the representation problems arising from mergers.

In *Switchmen's Union*, this Court pointed out that "the 'right' of the majority of any craft or class of employees" to choose a representative "is protected by § 2 Ninth, which gives the Mediation Board the power to resolve controversies concerning it"; that Congress did not provide for judicial review of the NMB's determinations in that regard, and that its plain intent was that there "was to be no dragging out of the controversy into other tri-

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[2] When those procedures were attacked in the District Court for noncompliance with the notice and hearing requirements of the APA, the NMB pointed out that they "are not regulations; they are simply a procedural framework under which the NMB can operate to expedite representation disputes after a merger has occurred," and thus come within the explicit exception, from the APA's requirements, for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." Memorandum in Support of Defendant National Mediation Board's Motion to Dismiss or, in the Alternative, for Summary Judgment, at 20 (citing and quoting 5 U.S.C. § 553).

bunals of law." *Switchmen's Union* v. *Board,* 320 U.S. 297, 300-301, 305 (1943); accord, *Railway Clerks* v. *Employees Ass'n,* 380 U.S. 650, 658-659 (1965). The controversy over the NMB's merger procedures has now been "dragging out" in "other tribunals" since 1989. If the *en banc* decision below is left standing, the efforts by the NMB to formulate procedures intended to protect the right of the majority of a craft or class to choose a representative will have been frustrated; and even if the NMB should succeed in devising "alternative ways" to address the serious representation problems arising out of mergers, further "dragging out" of the controversy in the courts may occur despite the decisions by this Court in *Switchmen's Union* and *Railway Clerks.* This surely is a matter of sufficient importance to justify review of the decision below by this Court.

3. The Opposition (at 12-13) deems it to be "significant . . . that the court of appeals ruled definitely only with respect to" the validity of the merger procedures; and that it "is unclear how, under the court of appeals analysis, the district court is expected to rule" upon the remand of the case challenging the application of those procedures on the Burlington Northern. That uncertainty arises from the fact that all five judges that comprised the majority expressly joined Judge Randolph's concurrence to the effect that, while *Switchmen's Union* precludes judicial review of certification decisions by the NMB, the merger procedures themselves are reviewable under the APA; but what is denominated as the Opinion for the Court, by Judge Edwards, bases reviewability upon the view that *Switchmen's Union* has been modified by *Leedom* v. *Kyne,* 358 U.S. 184 (1958). See Pet. at 8-9.

In our view, this is an added reason for granting the petition. The NMB rendered its decision in the *Burlington Northern* case on April 23, 1991, it has been "dragging out" in the courts for almost four years, and it may well require another trip to the Court of Appeals in order

to resolve that uncertainty if it is not resolved by this Court. Moreover, that uncertainty until resolved could affect future cases attacking other NMB rules and procedures under § 2 Ninth, or their application, or both. And, whatever may be true of the *Burlington Northern* case, the invalidation of the merger procedures, if not reversed, presumably will bar future applications of those procedures.

In that regard, the Opposition asserts (at 10-11) that to "the extent that the court of appeals relied on *Leedom* v. *Kyne*, *supra*, in determining that it had jurisdiction to review the validity of the Merger Procedures, the mode of analysis it employed is consistent with this Court's teaching." That is not very meaningful if, as the Opposition concedes, the extent of such reliance is "unclear," while APA review clearly may be had under the concurrence. But however that may be, the "mode of analysis" employed by Judge Edwards is contrary to the analysis by this Court in *Railway Clerks*, under which the *Leedom* v. *Kyne* doctrine applies only if the NMB violates a specific prohibition or a specific command in the Act. See Pet. at 11-13, and the Opposition at 4.

4. The Opposition also asserts (at 13) that there is no conflict with the decision by the Sixth Circuit in the *Grand Trunk Western* case (see the Pet. at 17-18). But while that case did not directly involve an attack on the validity of the merger procedures as such, it did involve a contention that the NMB did not have jurisdiction to entertain a petition by the carrier for clarification of an application of those procedures. See *Grand Trunk Western Railroad Co.*, 19 N.M.B. 226, 228-230 (1992). The Sixth Circuit expressly held that the carrier's petition to the NMB was "a proper procedure" as *Switchmen's Union* precluded review "of an action of the Board in issuing a certificate under § 2 Ninth." *Brotherhood of Maint. of Way Emp.* v. *Grand Trunk*, 961 F.2d 1245, 1248 (6th Cir. 1992). This appears to us to conflict squarely with

the holding by the court below in this case that the NMB does not have jurisdiction to investigate representation disputes on application of a carrier, and at least with the views expressed by Judge Edwards as to the reviewability of certification decisions under the merger procedures. But however that may be, the decision below is sufficiently important to justify review by this Court whether or not it conflicts with the decision by the Sixth Circuit.

CONCLUSION

This is an important case that both raises important issues of law and, unless reversed, has invalidated agency procedures intended to remedy significant representation problems arising out of mergers which have adversely affected the stability of labor-management relations in the railroad and airline industries. For the reasons stated in the petition and herein, the petition should be granted.

Respectfully submitted,

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